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Religion in American Public Life (with transcript)

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Case in Point: *Religion in American public life*

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Sarah Gordon and Mark Silk look at how the U.S. has historically regulated religious institutions as well as accounted for an individual's religious liberty.

EXPERTS

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Steven Barnes: Welcome to Case in Point, produced by the University of Pennsylvania Law School. I'm your host, Steve Barnes. In this episode, we'll look at how the US government has historically regulated religious institutions, as well as accounted for individual religious liberty. We will also examine what this may mean for today's debates in these issues.

We're pleased to be joined for this episode by first, Sarah Barringer Gordon, who is the Arlin M. Adams Professor of Constitutional Law and Professor of History here at Penn. Her most recent book is "The Spirit of the Law: Religious Voices and the Constitution in Modern America".

Also, joining us from Hartford, Connecticut is Mark Silk. He's a Professor of Religion and Public Life at Trinity College, and he's Director of the Leonard Greenberg Center for the Study of Religion in Public Life. You can read his blog at the Religion News Service website.

Thank you both for joining us. So, you have recently written the article, "The First Disestablishment" in University of Pennsylvania *Law Review*. Tell us a little bit about the article and the historical context that it covers, please.

Sarah Barringer Gordon: I'd be happy to. I became interested in the ways that states especially behaved after they disestablished in the early republic. We often see scholarship about either the federal government or a state, it's usually Virginia, and its process leading up to disestablishment, but no one's written about what happened the next morning. What do you do when you wake up, and there's no established religion? What I found actually surprised me. States up and down the East Coast, all the way out to California, over the next century, passed general incorporation statutes for religious societies, as they called them. In other words, they turned religious groups into corporations.

Steven Barnes: This is from after the American Revolution to the Civil War?

Sarah Barringer Gordon: That's right. From 1776 up to 1860 was this article, but it happens across American national history until the federal government starts hogging center stage in the mid-twentieth century. What happened was that states not only created the possibility for religious corporations to exist, but they then denied them the capacity to hold property unless they incorporated, and set strict limits on the amount of money and land they could own, and provided rules for how they had to be governed.

Steven Barnes: Just as a quick follow-up, so to define disestablishment means?

Sarah Barringer Gordon: It means to think of it in terms of a particular kind of institution, a corporation.

Steven Barnes: Just as an example, the Catholic Church in 1800, or Presbyterians, or whomever, what does that mean for an institution then? What would they need to do in order to abide by whatever legislation or regulations may have existed at the time?

Sarah Barringer Gordon: The state governments tended to make it very easy. They would fill out a simple form and pay a low filing fee, and then would be incorporated by the state. They were then required to elect, from their congregation, trustees who would be vested with all the assets of the organization: property, finances, and so on, and would run the day-to-day business of the institution. The government set strict limits on the amount of wealth such an organization could have, and, also, who would be in control of it.

Steven Barnes: I'm sorry. One more follow-on, but what I found striking about the article is that today there are very hot debates around the role of the government in religious institutions, as it relates to individual religious liberty. There are major court cases underway. There's legislation and so forth. In your paper, you say that both camps seem to miss the mark. Could you explain a little bit, please, what you mean by that?

Sarah Barringer Gordon: I can. If we're thinking of it as a basic conservative versus liberal split, the conservatives argue we should leave these religious organizations alone. They should be exempt, for example, from all kinds of regulation because we have this long history of respecting religious freedom. On the other hand, the liberal side of the camp argues for strict separation, not to have any involvement between religion and government, including not in the form of exemptions. At least what I found, in the early period when disestablishment was really being created on the ground in the states, was that there was heavy regulation, on the one hand, and deeper government involvement than we ever knew, on the other.

Steven Barnes: Fantastic. Mark, turning to you now, please. If you could, let's fast forward to today. How would you characterize the debates between those who may favor a little bit more intervention from the government into religious institutions, and those who have a more hands-off perspective?

Mark Silk: I think we've really seen a kind of seat change in the politics of religious free exercise over the past twenty-five years. It used to be seen as a liberal issue of let individuals make their claim, give them an opportunity to get into federal court to make a claim that some law or another disfavors their free exercise, and maybe they'll get an exemption. Now we've

seen almost a kind of spiritual libertarianism, which really goes along with Sally's point that you've got people, religious institutions who think that really they should be free to do just about anything. That government regulation represents an incredible intrusion, and an unwarranted one based on the First Amendment, into their right to run their own affairs. I think what we're seeing is a great departure from where things were, as Sally describes them, in the early republic.

Sarah Barringer Gordon: I think that's right. I, also, think that the issue that many of these, I'll take Mark's phrase, spiritual libertarians turn to history again and again, arguing that regulation is unprecedented, that interference is totally un-American, and at least what I found is a heavily regulated atmosphere in the early republic, and great flourishing of religious organizations, so the two are not inconsistent.

Steven Barnes: Why? That seems sort of counter-intuitive. Did your research reveal any insights as to why those outcomes occurred?

Sarah Barringer Gordon: One thing that strikes me is that the general incorporation statutes that were enacted by states, and, by the way, these were only for religious groups. General incorporation statutes for commercial enterprises came many decades later, so these were the first corporations through the chute, if you will. States made it very easy to form such organizations, and they gave control to the members of the organizations, rather than a religious hierarchy, for example, so people felt like that could actually spend their time and energy working to form a church or a synagogue, and that they would then have a say in how it was run.

What nobody really planned for was how to keep these organizations going once the members starting fighting. And you can see very early within a decade or so, the beginnings of a completely schismatic society that we still maintain today. Religious groups calve off from each other all the time. It really set the standard for the kind of behavior we see.

Steven Barnes: I was struck reading the article that this seems like something new in the field in sort of the survey of literature. Why is that? Why aren't more people informed about the

history of how religious institutions and individual liberties were considered by, if not our founders, by the recent descendants of our founders?

Sarah Barringer Gordon: That's a great question. I think what many constitutional scholars have done is look at, for example, the build-up to federal disestablishment, or disestablishment at the states, and then kind of skip a century, or even a century and a half, and assume that nothing really happened. The one scholar who took a look back in the early twentieth century, I swear the man never read a statute in his life. He collected a few cases, but he never actually checked the statute books. So, I think the fact that nobody has looked has really settled us in this pattern of not looking, and it took me ... I've been in the business for twenty years, and it took me till about year seventeen to realize no one had ever looked, and starting to look myself.

Steven Barnes: Fantastic. Mark, any reaction to that?

Mark Silk: Yeah. I teach at a little college in Hartford, Connecticut called Trinity College. It was established, it was created by Episcopalians. In 1823 is the charter. But, as we know the story, the whole creation of this college was part of disestablishment in Connecticut. The Episcopalians were a minority compared to the Congregationalists, who ran the joint, and they'd been agitating along with other disreputable characters, like Baptists, to get rid of Connecticut's standing order, which was our equivalent of an establishment, where you had to pay taxes to the Congregationalist Church, unless you designated some other church, but the Baptists didn't want any government designation.

Anyway, the reason I bring it up is that part of the deal was that in order to establish a college, you needed a charter with state government. And one of the things that the Connecticut legislature did, it was run by Congregationalists who said, "Okay. You can have your damn college, but you can't restrict admission to only Episcopalians, and you can't restrict the faculty either to only Episcopalians." If you said that today to a college, they would start pointing to various cases, and how you can you limit a religiously based college to force them to take people who weren't members of their own faith, and so on.

Steven Barnes: Let's fast forward to today. Are you aware, therefore, of any updates to Connecticut laws or federal laws that would supersede the original charter or the laws of the Connecticut legislature circa 1823?

Mark Silk: I think the main decision that we've had recently is something called Hosanna-Taber, where the Supreme Court for the first time finds what's called a ministerial exception, so that religious institutions of learning, if they designate a particular teacher as having kind of ministerial responsibilities, they're not bound by laws preventing, say, age or sex discrimination and other things like that. So, I think it's a – you know, it's a measure. That was a nine-zero opinion of the Supreme Court, and the Court had never actually pronounced on a kind of rule but had come to be accepted, but there was some question. The Obama Administration actually filed an eleventh-hour brief opposing it and got sort of slam-dunked. I think that contrary to some of the claims of some of the religious folks out there, we're living in an era where religious liberty is trumping a lot of things that it didn't used to trump.

Steven Barnes: Any reaction to that?

Sarah Barringer Gordon: Agreed. Agreed. Not only didn't use to trump, but hasn't trumped across American history.

Mark Silk: Right.

Sarah Barringer Gordon: Yes.

Steven Barnes: In your view, what does that mean? What are the implications of that?

Sarah Barringer Gordon: It means that when you see the rules of religious liberty being put into place through the process of designing how separation of church and state was going to work, that the state gave something, the privilege and security of incorporating, and in return, demanded something, democratic internal governance, and limits on the amount of wealth that these organizations could own. It really was a deal, much like the state of Connecticut said to the

good Episcopalians of Hartford, that they could have their college, but they, in return for the privilege of forming the institution, they had to behave within the state as a nondiscriminatory, if you could put it that way, a nondiscriminatory educational institution.

Steven Barnes: Let's discuss a couple of the cases that help to illustrate what we're talking about today. Mark, if you could, please, if you could speak a little bit about, for example, Indiana's recent religious freedom bill.

Mark Silk: Really it's hard to understand these things without knowing something about the Supreme Court's decision in Employment Division versus Smith, when Justice Scalia persuaded four of his colleagues to really change the way the Supreme Court deals with a free exercise cases. And I'll only say that what that decision did was say to ... or, what I think what everybody interpreted it as saying at the beginning was, said to small religious minorities, to any religious minority, look, if there's a law or a regulation out there that was passed not designed in any way to disfavor you, but which happens to be a problem for you, you can't go into court and claim a constitutional violation of your religious free exercise. If you're going to deal with that, you have to go to a legislature, get your exception that way.

That was very distressing to traditional religious liberty types, who were generally liberals who saw these kinds of religious liberty issues as an extension of civil rights generally. Conscious concerns for Jehovah's Witnesses, who don't want to say the Pledge of Allegiance, that kind of thing. So, the Supreme Court said no more, and in reaction to that, Congress passed, almost unanimously, and Bill Clinton signed happily, something called the Religious Freedom Restoration Act, which is a federal law, which told the Court to go back and decide cases the way it had used to decide them. The Court didn't appreciate being told how to decide the First Amendment and said up your nose with a rubber hose in a case called Birney.

But then things began to shift. So, there ensues a complicated story in which states begin to pass their own RFRAs, and Indiana's was the most recent example of that, and then it gets tied up in a set of cases that increasingly recognized corporations having free speech and then religious rights, so that takes us into Hobby Lobby.

There's a whole new world, brave new world in which religious rights can be exercised by people doing business, or companies doing business under certain circumstances, and, also, a world in which increasingly it's recognized, or it seems to be, that if you have an objection to somebody else's behavior, you have a religious right not to participate in that.

Steven Barnes: Your thoughts?

Sarah Barringer Gordon: I thought that one of the most interesting aspects of this move to shield oneself from, for example, the existence of others around you who may behave differently, appeared on the front page of the *New York Times* a few days ago, when Hasidic Jewish men getting on flights, say to Israel, refuse to be seated next to a woman, and the question is, does the woman have to move? Should the airline be required to provide seating that is consistent with religious practices, and so on? These are galloping. I think Mark's a hundred percent right that this is now becoming something that many groups claim is not only deeply important to them, but deeply traditional, and, yet, these claims are themselves new.

Mark Silk: The kind of claims that are being made now are what would happen if say you had a man and a woman go into a bakery, and they say we'd like a wedding cake for our marriage because we're about to get wed, for our wedding, and the baker says, "What names would you like on it," and they say, "George and Gracie." Then the baker says, "By the way, have either of you been divorced?" The man says, "Well, yeah. I guess twenty-five years ago, my first marriage didn't work out so well. This is the second marriage for me." The baker says, "Sorry. I can't give you the cake. I'm not going to do it. My church says divorce is wrong. I don't want to be complicit in your marriage. No can do. Find another baker." That is so far beyond. Nobody ever thought that that was a religious liberty claim back in the days when divorce become no fault, and nobody is claiming that now. But on the sorts of religious liberty claims that are being made routinely at the moment, that's probably better based than the same-sex marriage case.

It's a measure of how far we've come. It's not to say anything other than that, but this is a new world.

Steven Barnes: Thank you, Mark. As a historian and as a constitutional scholar, where is the thread leading us from the period after the American Revolution to the Civil War to where we are now? That balance between government intervention and religious institutions, on the one hand, and the protection of religious individual liberty?

Sarah Barringer Gordon: That's a great question. I think Mark referred to the Hobby Lobby case, for example, and the idea that even for-profit corporations, large ones, however closely held, large indeed, now may routinely claim religious rights. I think we're seeing, if you will, the boundaries blurring between different kinds of activities, and this sort of galloping sense that your perhaps private religious choices are now defensible in public arenas in ways we simply had not seen them before.

The point about divorce is a great one, and actually became very difficult for a number of religious organizations in the 1970s, for example, and were themselves, along with the ordination of women, very fruitful in causing schisms among religious organizations. That issue is now old hat, as I think Mark rightly points out, but it's not that it wasn't difficult in its day. It was very difficult.

Steven Barnes: I'm glad you mentioned schisms. In your paper, you say, "I believe that schism is the bane of a religious institution." Where did you see that play out in terms of your investigation into this time period?

Sarah Barringer Gordon: I would say it was the congregants that were usually the source of the trouble, although they usually accused the minister of being the source of the trouble, either through his introduction say of new practices. I'm thinking of a great case involving Isaac Mayer Wise in Albany, New York in the early 1850s, who was sued for a sermon that many congregants found objectionable. But it really was that lay control, the power of the purse strings. Even within the Catholic Church, courts held that lay trustees did not have the capacity

to hire or fire a priest. That was the privilege of the bishop, but the lay trustees could refuse to pay him, and so really the victory of the bishop is pyrrhic, at best, symbolic.

One of the things that happened is when congregants began to disagree with a minister, with the hierarchy, with each other, they literally could vote with their feet and go form a new religious organization, or claim that they had now become the old religious organization. They just had new ideas and kick the old people out. It really became a free for all, and the litigation on these questions is absolutely staggering. I found many thousands of cases. It's just remarkable.

Steven Barnes: Wow. It seems to have continued today. Thank you for that. Mark, you recently wrote in your blog about a case involving Episcopalians in Texas in tracking almost to the word of your article, Sally. A schismatic group, if I may characterize them as such, suing for property. Could you talk a little bit about that, please, Mark?

Mark Silk: For some reason, Episcopalians are deeply attached to property.

Sarah Barringer Gordon: They have a lot of it.

Mark Silk: As you may know, really since the Episcopalians decided to go ahead and have a partnered openly gay priest become bishop, Bishop Robinson of New Hampshire, has since retired, this pushed conservative Episcopalians over the edge, and they decided to create different churches, a couple of different ones. Then the question is what happens to the property? And this has always been a case which ends up in court. I think in some ways, and it gets to Sally's point, American law and the way we do business is basically it wants to regard religious groups as congregational. You've got people who run them. They get to hire and fire. The problem is that a lot of religion isn't congregational. The Catholics have a hierarchy. The Episcopalians have a hierarchy. Even the Methodists have a species of hierarchy, and the question of who really runs it, who controls it, what's the history of it, it makes for various kinds of complexity, which the courts have to address as secular entities, trying not to pronounce on issues that are regarded as purely religious. This creates an endless array of mare's nests to try to sort all this out, but since we don't have any other way to solve property disputes really, unless

both parties agree on some third party procedure, these things are going to end up in secular courts.

Steven Barnes: Great. Please.

Sarah Barringer Gordon: I just want to just say that Catholics embraced lay governance. They embraced it with great enthusiasm to the great distress of bishops in the early national period. What's so interesting is that we think of Catholics as having a hierarchy, but many Catholics thought of themselves as not having a hierarchy, or certainly not one that could dictate to them that they had to accept a priest they didn't want, or hand over the keys to the vault and so on. What's really interesting is how popular lay governance was with groups on the ground, and the hierarchs are the ones who said we don't operate like that.

Steven Barnes: In your article, you point out that disestablishment empowered the laity.

Sarah Barringer Gordon: Yeah.

Steven Barnes: Could you give a couple more examples as to how, and help, at least me, understand how we got to where we are now. You mentioned the Catholic Church, for example. They have been dealing in the last ten, fifteen years with quite a few questions around the relationship and the decision-making or input capabilities of the laity versus the church hierarchy.

Sarah Barringer Gordon: Yes. I would be happy to. One of the things that is most notable about the first appearance of these general incorporation statutes is that they were in the mid-Atlantic, not in Congregational regions, so to the extent that there's an assumption that legislatures were imposing a congregational form of governance, they didn't see themselves doing that. It was Maryland, Delaware, Pennsylvania and New Jersey, New York, not so much New England.

In one sense, there's a pluralistic background, if you will, in religious terms for this legislation, and in another, they really encouraged pluralism. And, so, part of what I spoke about with Catholics replicated itself in other groups. I'm thinking in particular of a group in Philadelphia of breakaway African-American Methodists who founded Mother Bethel Church, and duly incorporated the church in 1796, and then navigated out from under the white elders of the denomination, eventually being able to found their own AME denomination in 1816. What they did is they used the law, the powers of lay trustees, to challenge, ever more pointedly and ever more completely, white control. It's not that it was easy, but they could get it done because they had this stature as trustees of a corporation. They had new legal rights, new legal powers.

In terms of the situation today, not only did denominations get better at dealing with legislatures and negotiate for themselves all kinds of wonderful things, like tax exemptions, or tax-exempt bond funding, and so on, but they, also, got much smarter about how to deal with lay governance, and how to raise, for example, the ceilings on property, how to put into agreements between new churches being formed and the denomination, much more control by the central denomination, so they lawyered up. I guess that's a right way to put it.

In terms of the Catholic Church, I'm thinking still of several churches that have been allowed to break away from a given diocese before the diocese went bankrupt, because they had such long-established patterns of local control. Much as we now don't think of American Catholics as having substantial amounts of local control, I think we sort of sweep that aside too readily, because they do retain substantial input, even though the church has gotten much more professional at tamping down that kind of dissent.

Steven Barnes: Mark, we talked about the laity. Yet, I was struck, you, I believe it was March, wrote an article that said, "Religion is out of control today, especially in terms of how religious institutions deal with followers and observers in the digital space." Could you talk a little bit about that, please?

Mark Silk: I think it was inspired by a piece that Sally did with Jan Shipps about the amount of online argumentation, I guess we could put it, that's taking place in the Mormon world,

particularly that part of the Mormon world that's centered in Salt Lake City. Of all the churches and synagogues, religious institutions that exist in America today over the past century, I think the LDS Church has exerted the most control. It's now a digital world in which you can find all kinds of things. And what that means is that these schismatic tendencies that Sally's talking about, now can be pumped up, multiplied, applied in places where – which didn't used to have them, or where they took much longer to develop. And in a way, what's happened is similar to the role of printing in the Protestant Reformation. There had been plenty of heresies in the Middle Ages, the later Middle Ages, but now when you have the invention of the printing press, you suddenly had a capacity for people to immediately know not only what Luther was writing, but what he looked like, you had, you know. And it changed the entire complexion of what was once called Western Christendom.

Steven Barnes: Any reaction?

Sarah Barringer Gordon: Yes. A parallel here I think. The great technological intervention of the early nineteenth century was the corporate forum, which allowed you to do all kinds of things you couldn't otherwise do, including call together a group of people and plant a church and get it protected. Then the fights began between and among the people in the pews. What's so interesting is that the pews, which had not been full, began to fill up with this efflorescence of new institution building, and now they're emptying again as people are spending their time on blogs, and finding spiritual growth and conflict in another arena.

Steven Barnes: It's a perfect segue then; we've talked about the past, we've talked about the present. Let's talk a little bit about the future, at least the near future. What trends do you see ahead in the debates, the policy in legal cases that will be upon us in the next few years?

Sarah Barringer Gordon: Historians are good at the past, not so much at the future. My own future will entail being on sabbatical next year and writing a book. On the other hand, what I do see is that some of the issues that Mark was talking about earlier, in particular with Indiana and other states that are either drafting or amending their religious freedom restoration acts, is that they are directly challenging a thirty-three year old case, Bob Jones University against United

States, which held that Bob Jones University, even though it had a sincere religious belief against racial amalgamation, and thus would not allow interracial dating or marriage among students, that it could have its tax exemption revoked, because it was in violation of the mandate for equality under the United States Constitution.

The RFRAs that are being proposed today are trying to walk back that decision, and there was an amicus brief filed in the recent same-sex marriage case that argued explicitly for just that, that Bob Jones should not be extended to the same-sex marriage arena, and this I think will be hard fought. You saw some of that in the reaction to Mike Pence's signing of the Indiana law. I think he was caught a bit off guard, but those of us who know what's going on behind this realize that all kinds of discrimination are at issue. Not just what bakers are engaging in against – in same-sex weddings, for example. This is a major, major new campaign.

Steven Barnes: Mark.

Mark Silk: I agree with that. One of the ways to see some of what's going on I think, and it may seem overwrought to say so, but it's a sort of guerilla war or a countercultural war to carve out significant states in American society for those folks who object to new developments, same-sex marriage foremost among them at the moment.

But if you think about the set of issues involving contraception and abortion and the number of Americans who are served by Catholic hospitals, and you look at legislation restricting the ability of abortion clinics to perform their services, what you see is that even as Roe v. Wade remains intact, fewer Americans have access, or fewer women have access to these services through various kinds of restrictive policies. So, you create a lot of territory, and not just personal religious life in your own house, but hunks of American society, including geographical hunks, where the older order prevails.

I'm inclined to think that what this is going to do, among other things, is create an unfortunate situation, in which the kinds of religious liberties that has tended to elicit widespread support, real religious minorities wanting to, you know, Amish not wanting to have to put headlights on

their buggies, and Jehovah's Witnesses wanting the freedom to proselytise, or just not say the Pledge of Allegiance. These things are going to be increasingly markers of the larger culture war, and smaller religious minorities get hurt in the shuffle.

I think it's unfortunate. I don't like neutral laws of general applicability not letting groups get their day in court, but I think we're headed for some tough times.

Steven Barnes: Any reaction to that?

Sarah Barringer Gordon: That's very well put.

Steven Barnes: Professor Gordon, Professor Mark Silk, thank you so much for joining us, and for offering your insights. This has been a very useful and informative conversation, looking at our history, our present, and where we might be going in our future in terms of the role of government in regulating religious institutions, and in individual religious liberty questions.

On behalf of Case in Point here at Penn Law, thank you for joining us.

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